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In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL JOHN GRASSI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 602 F. 2d 1192.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1979. A petition for rehearing was denied on October 24, 1979 (Pet. App. 13a). The petition for a writ of certiorari was filed on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who did not raise the issue in the court of appeals, may now argue in this Court that the exclusionary rule should be applied to suppress five

obscene films consensually transferred to the government by a third party to whom the films had been inadvertently misdelivered.

2. Whether the trial court's average person instruction, to which petitioner did not object, constituted plain error.

3. Whether it was error to permit the jury to view three of the five films alleged in the indictment to be obscene after petitioner offered to stipulate to their obscenity.

4. Whether the prosecutor's remarks in closing argument deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1465, on an additional five counts of using a common carrier to transport obscene films in interstate commerce, in violation of 18 U.S.C. 1462, and on one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Petitioner was sentenced to three years' imprisonment on the conspiracy count, and to concurrent terms of two years' imprisonment on each of the substantive counts, to run consecutively to the sentence imposed on the conspiracy count; execution of sentence on the substantive counts was suspended in favor of three years' probation. The court of appeals affirmed (Pet. App. 1a-12a).

1. Petitioner was indicted together with co-defendants William Walter and Arthur Sanders, petitioners in Nos. 79-67 and 79-148, respectively, cert. granted, October 15, 1979, but was tried separately from his co-defendants after the district court granted his motion for a severance. The basic facts in both cases are essentially alike.[1] The evidence in the instant case showed that petitioner was employed by Walter and Sanders as a "roadman" for their network of adult book stores, theaters, and distribution warehouses in Florida and Georgia. His responsibilities included finding locations for and opening new stores from which he received a share of the profits. He also owned and managed an adult bookstore in Atlanta which carried films similar to the films involved in this case. He stocked his store with materials selected from Sanders' and Walter's Trans World America (TWA) warehouse in Atlanta[2] (II Tr. 41-41, 197-201; V Tr. 164-175, 191-193).[3]

2. Prior to trial, petitioner and co-defendants Walter and Sanders moved to suppress certain films from evidence, alleging that the government's acquisition and retention of the films violated their rights under the Fourth and First Amendments. As we detail in our brief in Nos. 79-67 and 79-148 (at 4-9), the evidence showed that on September 25, 1975, employees of Walter and Sanders shipped 12 cartons containing 871 hard-core pornographic films of a homosexual nature from St. Petersburg, Florida, to Atlanta, Georgia, via Greyhound Package Express. The films were being returned to the TWA warehouse because they were not selling in the

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[1]We are sending petitioner a copy of our brief in Nos. 79-67 and 79-148.

[2]TWA was convicted along with Walter and Sanders and is a co-petitioner in No. 79-148.

[3]"Tr." preceded by volume number designates the reporter's transcript.

Florida adult bookstores. The shipper of the packages substituted the fictitious name "Leggs, Inc." for TWA, the intended recipient. The use of this fictitious name resulted in an inadvertent misdelivery of the shipment by Greyhound to one of its regular customers, "L'Eggs Products, Inc." a manufacturer of women's hosiery that maintains business offices in an Atlanta suburb. The hosiery company, in turn, contacted the FBI and gave the films to the government. In mid-October, petitioner, who had been assigned by Walter and Sanders to locate the shipment, inquired at the hosiery company, and learned of the company's unsolicited receipt of the films and its subsequent decision to rid itself of the unwanted merchandise by giving the films to the FBI. About one month after the films were transferred to the government, FBI agents viewed the films with the aid of a projector.

After a hearing, the district court found that petitioner and his co-defendants had "standing" to seek suppression of the films, but concluded that their Fourth Amendment rights had not been violated because they had relinquished any legitimate expectation of privacy they may have had in the shipment when they shipped the cartons by common carrier under fictitious names (Nos. 79-67 and 79-148 A. 35-40). In the alternative, the court concluded that this case involved only a private search and therefore did not implicate Fourth Amendment interests (Nos. 79-67 and 79-148 A. 41-44). Accordingly, the motion to suppress was denied.

3. At trial petitioner sought to stipulate to the obscenity of the films in exchange for the government's agreement not to show the films to the jury. Petitioner indicated that he intended to defend against the charges by alleging that he had not viewed the films and

therefore lacked scienter. The government objected to the proffered stipulation. As a compromise, the district court permitted the government to exhibit three of the five films (V Tr. 7-9).

At the close of the evidence, the district court gave the jury the following instruction concerning community standards (IV Tr. 642):

> Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment which must be made in light of contemporary standards, as would be applied by the average person, with average and normal attitude [sic] toward, and interest in, sex. Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general.
>
> So obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

Thereafter, the court asked petitioner's attorney if he had any objections to the charge, to which counsel responded "No, sir" and "It was fine, Your Honor" (IV Tr. 656).

ARGUMENT

1. Petitioner contends (Pet. 10-12) that the introduction into evidence of the five obscene films violated his Fourth and First Amendment rights. In addition, petitioner argues (Pet. 12-13) that the district court's "average person" charge violated the rule of *Pinkus* v. *United States*, 436 U.S. 293 (1978). These issues are now before the Court in *Walter* v. *United States*, and *Sanders*

v. *United States*, cert. granted, Nos. 79-67 and 79-148 (Oct. 15, 1979). Accordingly, the Court may wish to hold the instant petition pending a decision in *Walter* and *Sanders*, and to dispose of this case as appropriate in light of that decision. We note, however, that petitioner stands in a different posture than co-defendants Walter and Sanders with respect to these issues.

a. Petitioner did not raise the suppression issue in the court below. As petitioner concedes (Pet. 6), the only statement about suppression in his court of appeals brief[4] was in a footnote that stated:

> The issue of whether the Motion to Suppress was properly denied has not been presented because of the recent decision of *United States* v. *Busch*, [sic] 582 F. 2d 1016 (5th Cir. 1978) which holds that Appellant has no standing; if, however, this decision is overruled or reconsidered, the Appellant specifically reserves the question of whether he has standing to challenge the search and seizure of the films in the instant case.

The district court had found that petitioner did have "standing" to move for suppression of the films but lacked a legitimate expectation of privacy in the contents of the shipment, and that, in any event, this case involved a search by private parties that did not implicate the Fourth Amendment. On the other hand, *United States* v. *Bush*, 582 F. 2d 1016, 1018-1019 (5th

[4]Petitioner's court of appeals brief was filed on January 9, 1979, several months before the court of appeals decided the *Walter* and *Sanders* case. See *United States* v. *Sanders*, 592 F. 2d 788 (Pet. App. 14a-49a).

Cir. 1978),[5] held that a corporate officer who did not claim a possessory interest in the items seized lacked standing to challenge a search of the corporation's property. The decision in *Bush* posed no barrier to petitioner's litigation of his suppression motion on direct appeal. Therefore, unless the Court finds the circumstances to be exceptional, it should not deviate from its well settled rule of considering and reviewing only those issues raised in the court of appeals. *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7 (1977). See also *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

b. As to the instruction issue, which petitioner now contends should have been measured by the standards of the "average adult" rather than the "average person" in the community, unlike co-defendants Walter and Sanders, petitioner did not object to the instruction at trial and therefore the issue may be reviewed on appeal only if it amounts to plain error. Rules 30 and 52(b), Fed. R. Crim. P. See *United States* v. *Kilburn*, 596 F. 2d 928, 935 (10th Cir. 1978); *United States* v. *Clavey*, 565 F. 2d 111, 118 (7th Cir. 1977), cert. denied, 439 U.S. 954 (1978); *United States* v. *Williams*, 455 F. 2d 361, 365 (9th Cir.), cert. denied, 409 U.S. 857 (1972); *United States* v. *Mancuso*, 423 F. 2d 23, 29 (5th Cir.), cert. denied, 400 U.S. 839 (1970). Moreover, since petitioner conceded in his opening and closing arguments that the films were obscene (IV Tr. 562; V Tr. 141-142; Pet. 7-8), the standard by which the films were judged is irrelevant.

[5]Petitioner was not an appellant in *Bush*, although co-defendants Sanders and TWA were. That case arose out of a different factual setting and is completely unrelated to the present case.

The error, if any, of employing an "average person" rather an "average adult" standard for judging obscenity was therefore harmless beyond a reasonable doubt.

2. As to the other issues, not presented in *Walter* and *Sanders*, they were correctly decided by the court below and do not warrant review by this Court.

a. Contrary to petitioner's contention (Pet. 13-16), it was not error for the district court to permit the government to show the jury three of the five obscene films despite petitioner's offer to stipulate to their obscenity. As a general rule, the government is not bound by the defendant's offer to stipulate and may insist upon proving all essential elements of its case. See, *e.g.*, *United States* v. *Peltier*, 585 F. 2d 314, 324 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979); *United States* v. *Brinklow*, 560 F. 2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Cockerham*, 476 F. 2d 542, 545 (D.C. Cir. 1973). Here, the obscenity *vel non* of the films was the central issue in the case; the films were "the gist of the offense charged rather than descriptive or illustrative of a scene or an occurrence." *Parr* v. *United States*, 255 F. 2d 86, 88 (5th Cir.), cert. denied, 358 U.S. 824 (1958); *United States* v. *Mishkin*, 317 F. 2d 634, 638 (2d Cir.), cert. denied, 375 U.S. 827 (1963). Their probative value extended not only to establishing obscenity, but also to providing circumstantial proof of petitioner's scienter by showing that this case is not one in which a legitimate film distributor inadvertently stocks a film that barely crosses the line separating protected modes of expression from obscenity. See *Parr* v. *United States*, *supra*; *United States*, v. *Mishkin*, *supra*; cf. *United States* v. *Cockerham*, *supra*. The government was entitled to remove from the minds of the jurors all doubts that these films bore any

resemblance to protected speech by showing that the films were utterly devoid of any redeeming scientific, artistic, political or literary value. In any criminal trial, much of the prosecution's evidence will be prejudicial to the defendant, yet the defendant has no general right to exclude all such evidence by agreeing to stipulate. Here, where the probative value of the films clearly outweighed their prejudicial impact (see Rule 403, Fed. R. Evid.), the compromise solution of the district court was not an abuse of its discretion.[6]

b. Petitioner assigns as error two portions of the prosecutor's closing argument. First he claims (Pet. 8, 16-17) that the prosecutor should not have speculated on rebuttal that petitioner's salary was supplemented by payments that were not reported to the Internal Revenue Service (IV Tr. 609-610). But this argument was a direct response to the summation by petitioner's attorney, who attempted to convince the jury that petitioner must have played an insignificant role in the pornography business

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[6]Petitioner alleges a conflict between the present case and *United States* v. *Spletzer*, 535 F. 2d 950, 955-956 (5th Cir. 1976). An intra-circuit conflict, however, is best resolved by the court of appeals and is not a sufficient ground for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, *Spletzer* is distinguishable on its facts. The offense in *Spletzer* was escape from federal custody, and hence, one element of the offense was that the defendant had been in custody. The defendant offered to stipulate to that fact but did not want the jury to learn of the crime (bank robbery) for which he had been in custody. The government refused to so stipulate, and it introduced at trial evidence not only of the defendant's custodial status but also of his underlying bank robbery conviction. The court of appeals held that custody could have been proven without referring to the nature of the underlying offense and hence the prejudicial impact of the robbery conviction outweighed its probative value. Whether or not *Spletzer* was correctly decided, it has no relevance here, where the obscenity of the films was an element of the offense, and the films were highly probative of petitioner's guilt or innocence.

since his total reported salary over a four month period was only $633.34 (II Tr. 174; IV Tr. 582, 595). As petitioner conceded in the court of appeals, John T. Catoe, another employee of Walter and Sanders, had testified that he had received some of his salary in cash for the very purpose of evading taxes (Pet. C.A. Br. 12). The prosecutor thus rebutted petitioner's closing argument by analogizing to Mr. Catoe's circumstances (IV Tr. 609-610):

> Now, isn't it logical, isn't it reasonable, as Mr. Catoe indicated, he got a few dollars cash money under the table? For what purpose? So that the IRS would not know about it.

The district court ruled that this argument was based on the evidence. Since petitioner had invited the government to draw this reasonable inference from the evidence by focusing on the unusually small salary he received, he cannot claim that this reference was reversible error.[7]

Petitioner also contends (Pet. 9, 17) that it was error for the prosecutor to mention during closing argument that petitioner hired women to work in massage parlors

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[7]Petitioner asserts (Pet. 16) that the decision of the court of appeals in this case conflicts with several other Fifth Circuit opinions and one Ninth Circuit case, *United States* v. *Martinez*, 514 F. 2d 334 (9th Cir. 1975). As we noted previously, any intracircuit conflict does not warrant review by this Court. See note 6, *supra*. In any event, the cases cited by petitioner are inapposite on their facts. For example, in *United States* v. *Martinez*, *supra*, the prosecutor told the jury that he personally knew of evidence incriminating to the defendant beyond what was presented at trial. Since the government's case against the defendant was "thin," such argument was held to be reversible error. 514 F. 2d at 343. In the present case the prosecutor was not intimating that he knew something beyond the evidence at trial. Rather, he was arguing what might reasonably be inferred from the evidence.

(IV Tr. 556), although petitioner concedes that this argument was supported by evidence adduced at trial (II Tr. 201). Specifically, Peggy Smith, an employee at Trans World America, was describing petitioner's various duties there when she testified:

> He took—he came into an office job at the warehouse and he would enter [sic] the applicants for positions of clerks or managers of the book stores and girls that would be hired for the [massage parlors].

To prove petitioner's scienter, the government had to rely on circumstantial evidence. By showing the various functions performed by petitioner for Walter and Sanders, the government was able to prove that petitioner knew the nature of the business he was in and the nature of the merchandise sold in that business. The evidence showed not only that petitioner interviewed women to work in massage parlors but also that he ran his own adult book store, looked for places in which to expand Walter's and Sanders' pornography business, made certain that their adult book stores were fully stocked, ordered merchandise for the Trans World America warehouse, and hired bail bondsmen to post bail for employees arrested for dealing in pornography (II Tr. 197-201; V Tr. 164-175). In light of the legitimate purpose served by Ms. Smith's testimony, the prosecutor's single reference to that evidence on closing argument was not reversible error.

CONCLUSION

The petition for a writ of certiorari should be denied, or, in the alternative, held pending the disposition of *Walter* v. *United States, supra*, and *Sanders* v. *United States, supra*.

Respectfully submitted.

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